IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 492 OF 2004

Shri Mehar Khan,
s/o Alifan Khan,
married, major in age,
r/o Bhatim,
Shiroda, Goa. ... Petitioner.

Versus

1. Shaikh Ali Usman,
s/o Shaikh Mussa,
married, businessman,
major in age and his
wife,

2. Mrs. Shaikh A. Usman,
housewife, both r/o
Tolleacanto, Velim,
Salcete, Goa,

3. Umakant Tanaji Koloikar,
major in age, married,
and his wife,

4. Smt. Shamin Umakant
Kolvekar, major in age,
married, housewife, both
r/o Health Centre,
Quarters, Karai,
Shiroda, Goa. ... Respondents.

Shri V. A. Lawande, advocate for the petitioner.

Shri A. De Silva, advocate for respondent nos.1 and 2.

CORAM : B. H. MARLAPALLE, J.

DATE : 9th December, 2004,.

ORAL JUDGMENT

Heard Mr. Lawande, learned counsel for the petitioner. Leave to delete respondent nos.3 and 4. Amendment be carried out forthwith.

2. Rule. Mr. De Silva waives service on respondent

nos.1 and 2.

3. By consent, the petition is taken up for hearing forthwith.

4. The petitioner had instituted Regular Civil Suit No.26/2002 for specific performance of an agreement and for several consequential reliefs. The learned Civil Judge, Senior Division at Ponda by his Judgment and Order dated 15th October, 2003, dismissed the suit but did not even consider the alternate prayer which was specifically set out in the plaint, regarding refund of the amount paid i.e. Rs.78,500/-, pursuant to the agreement. The petitioner, therefore, approached the District Court in Regular Civil Appeal No.223/2003 and filed an application at Exh.13 for amendment of the prayer clause (c). After hearing both the parties, this application came to be rejected by the learned Second Additional District Judge, North Goa, Panaji, by the impugned Order dated 28th September, 2004. The learned Judge of the lower Appellate Court held that there was no issue framed regarding the refund of the amount and the appellant could not be heard to say that the evidence required in proof of the proposed amendment was already on record. It was further held that if the amendment was allowed, it would raise fresh factual questions. The plea of the appellant that the proposed amendment was mainly clarificatory in nature was discarded, by holding that after the amendment is allowed it

would run counter to the earlier case.

5. The reasoning given by the lower Appellate Court is unsustainable. The defendant nos.1 and 2 (the present respondent nos.1 and 2) had filed written statement in Regular Civil Suit No.26/2002 on or about 15th March, 2002 and in para 4 of the said written statement they admitted thus:-

> "4. Regarding para 3 of the plaint, it is admitted that Rs.25,000/- were paid at the time of execution of the Agreement. However, the Agreement provides for payment of instalments and no instalment as provided in the Agreement has been paid by the Plaintiff to the Defendant. However, after the execution of the Agreement, the Plaintiff paid to the Defendant a sum of Rs.8,000/- on 20.12.1999, Rs.10,000/- on 29.12.1999, Rs.10,000/- on 27.1.2000, Rs. 5,000/- on 10.3.2000, Rs.10,000/- on 20.3.2000 and Rs.10,000/- on 30.5.2000 and as per Agreement, the Plaintiff had to pay to the Defendant a sum of Rs.1,18,850/- before 28.5.2000 and, therefore, there is a default on the part of the Plaintiff in performance of this part of the Agreement and, therefore, he is not entitled for the specific performance of the Agreement."

6. On the face of this admission, it was necessary for the trial Court to consider the alternative prayer for refund of Rs.78,500/- and the amendment sought for before the lower Appellate Court was to the same effect so as to amend prayer Clause (c). The impugned Order has thus resulted in miscarriage of justice and the learned Judge of the lower Appellate Court committed a manifest error in rejecting the application at Exh.13.

7. Hence, the petition is allowed, the impugned Order is quashed and set aside. The application for amendment at Exh.13 stands allowed. Hearing of the appeal is expedited. Rule is made absolute accordingly, with no order as to costs.

B. H. MARLAPALLE, J.

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